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## PROCEDURAL HISTORY

On February 12, 2007, petitioner filed a petition for writ of habeas corpus in state court. Index, Exhibit 6. On April 3, 2007, the district court entered an order denying the petition,

1 finding that it was filed more than one year after the Nevada Supreme Court issued its remittitur on  
2 direct appeal. Index, Exhibit 7. Notice of entry was made on April 5, 2007. *Id.*

3 Petitioner filed a notice of appeal from the order denying his state court petition on  
4 May 7, 2007. Index, Exhibit 9. The Nevada Supreme Court entered its order dismissing the appeal  
5 on December 28, 2007, affirming the finding of procedural default. Index, Exhibit 10. Remittitur  
6 issued on January 25, 2008. Index, Exhibit 11.

7 On April 17, 2008, this court received petitioner's present *pro per* petition for writ of  
8 habeas corpus. (Docket #1-2.) The petition provides no information as to when the petition was  
9 mailed or handed to a correctional officer for delivery to this court, that portion of the form petition  
10 having been left blank. On July 13, 2009, the court entered an order denying petitioner's motion for  
11 a stay, and dismissing counts 2, 4, 5, 6, and 7. (Docket #14.) Respondents filed their motion to  
12 dismiss grounds 1 and 3 on November 13, 2009. (Docket #20.) Petitioner filed his opposition on  
13 November 30, 2009. (Docket #22.)

### 14 LEGAL STANDARDS

15 The Antiterrorism and Effective Death Penalty Act ("AEDPA"), at 28 U.S.C. §  
16 2254(d), provides the legal standard for the Court's consideration of this habeas petition:

17 An application for a writ of habeas corpus on behalf of a  
18 person in custody pursuant to the judgment of a State court shall not be  
19 granted with respect to any claim that was adjudicated on the merits in  
20 State court proceedings unless the adjudication of the claim –

21 (1) resulted in a decision that was contrary to, or involved an  
22 unreasonable application of, clearly established Federal law, as  
23 determined by the Supreme Court of the United States; or

24 (2) resulted in a decision that was based on an unreasonable  
25 determination of the facts in light of the evidence presented in the  
26 State court proceeding.

27 The AEDPA "modified a federal habeas court's role in reviewing state prisoner  
28 applications in order to prevent federal habeas 'retrials' and to ensure that state-court convictions are  
29 given effect to the extent possible under law." *Bell v. Cone*, 535 U.S. 685, 693-694 (2002). A state

1 court decision is contrary to clearly established Supreme Court precedent, within the meaning of 28  
 2 U.S.C. § 2254, “if the state court applies a rule that contradicts the governing law set forth in [the  
 3 Supreme Court’s] cases” or “if the state court confronts a set of facts that are materially  
 4 indistinguishable from a decision of [the Supreme Court] and nevertheless arrives at a result  
 5 different from [the Supreme Court’s] precedent.” *Lockyer v. Andrade*, 538 U.S. 63, 73 (2003)  
 6 (quoting *Williams v. Taylor*, 529 U.S. 362, 405-406 (2000) and citing *Bell v. Cone*, 535 U.S. 685,  
 7 694 (2002)).

8 A state court decision is an unreasonable application of clearly established Supreme  
 9 Court precedent, within the meaning of 28 U.S.C. § 2254(d), “if the state court identifies the correct  
 10 governing legal principle from [the Supreme Court’s] decisions but unreasonably applies that  
 11 principle to the facts of the prisoner’s case.” *Lockyer v. Andrade*, 538 U.S. at 75 (quoting *Williams*,  
 12 529 U.S. at 413). The “unreasonable application” clause requires the state court decision to be more  
 13 than merely incorrect or erroneous; the state court’s application of clearly established federal law  
 14 must be objectively unreasonable. *Id.* (quoting *Williams*, 529 U.S. at 409).

15 In determining whether a state court decision is contrary to, or an unreasonable  
 16 application of federal law, this Court looks to the state courts’ last reasoned decision. *See Ylst v.*  
 17 *Nunnemaker*, 501 U.S. 797, 803-04 (1991); *Shackleford v. Hubbard*, 234 F.3d 1072, 1079 n.2 (9<sup>th</sup>  
 18 Cir. 2000), *cert. denied*, 534 U.S. 944 (2001).

19 Moreover, “a determination of a factual issue made by a State court shall be presumed  
 20 to be correct,” and the petitioner “shall have the burden of rebutting the presumption of correctness  
 21 by clear and convincing evidence.” 28 U.S.C. § 2254(e)(1).

## 22 DISCUSSION

23 Respondents move to dismiss this petition on the ground that it is barred by the  
 24 statute of limitations. Rule 4 of the Rules Governing Section 2254 Cases allows a district court to  
 25 dismiss a petition if it “plainly appears from the face of the petition and any exhibits annexed to it  
 26 that the Petitioner is not entitled to relief in the district court . . . .” The Advisory Committee Notes

1 to Rule 5 of the Rules Governing § 2254 Cases state that “an alleged failure to exhaust state  
 2 remedies may be raised by the Attorney General, thus avoiding the necessity of a formal answer as to  
 3 that ground.” The Ninth Circuit has referred to a respondent’s motion to dismiss as a request for the  
 4 Court to dismiss under Rule 4 of the Rules Governing § 2254 Cases. *See, e.g., O’Bremski v. Maass*,  
 5 915 F.2d 418, 420 (1991); *White v. Lewis*, 874 F.2d 599, 602-03 (9<sup>th</sup> Cir. 1989); *Hillery v. Pulley*,  
 6 533 F.Supp. 1189, 1194 & n.12 (E.D. Cal. 1982). Based on the Rules Governing Section 2254  
 7 Cases and case law, the court will review respondents’ motion to dismiss pursuant to its authority  
 8 under Rule 4.

9 On April 24, 1996, Congress enacted the Antiterrorism and Effective Death Penalty  
 10 Act of 1996 (“AEDPA”). The AEDPA imposes various requirements on all petitions for writ of  
 11 habeas corpus filed after the date of its enactment. *Lindh v. Murphy*, 521 U.S. 320, 117 S.Ct. 2059,  
 12 2063 (1997); *Jeffries v. Wood*, 114 F.3d 1484, 1499 (9<sup>th</sup> Cir. 1997) (en banc), *cert. denied*, 118 S.Ct.  
 13 586 (1997).

14 The AEDPA imposes a one year period of limitation on petitioners seeking to file a  
 15 federal petition for writ of habeas corpus. 28 U.S.C. § 2244(d)(1). As amended, Section 2244,  
 16 subdivision (d) reads:

17 (1) A 1-year period of limitation shall apply to an application for a writ of habeas  
 18 corpus by a person in custody pursuant to the judgment of a State court. The  
 limitation period shall run from the latest of –

19 (A) the date on which the judgment became final by the conclusion of direct  
 20 review or the expiration of the time for seeking such review;

21 (B) the date on which the impediment to filing an application created by  
 22 State action in violation of the Constitution or laws of the United States is removed, if  
 the applicant was prevented from filing by such State action;

23 (C) the date on which the constitutional right asserted was initially recognized by  
 24 the Supreme Court, if the right has been newly recognized by the Supreme Court and made  
 retroactively applicable to cases on collateral review; or

25 (D) the date on which the factual predicate of the claim or claims presented  
 could have been discovered through the exercise of due diligence.

26 (2) The time during which a properly filed application for State post-conviction or  
 other collateral review with respect to the pertinent judgment or claim is pending shall

1 not be counted toward any period of limitation under this subsection.

2 In this case, petitioner's judgment became final ninety days from the entry of the Nevada  
 3 Supreme Court's order denying his direct appeal, when the period for seeking review in the United  
 4 States Supreme Court expired.<sup>1</sup> *See Barefoot v. Estelle*, 463 U.S. 880, 887 (1983); *Bowen v. Roe*,  
 5 188 F.3d 1157, 1159 (9<sup>th</sup> Cir.1999) (concluding period of "direct review" includes the period within  
 6 which one can file a petition for a writ of certiorari in the United States Supreme Court). The  
 7 period between when direct review becomes final and the filing of a state habeas petition is not  
 8 tolled; tolling begins when the state habeas petition is filed. *Raspberry v. Garcia*, 448 F.3d 1150,  
 9 1153 n. 1 (9<sup>th</sup> Cir.2006) (quoting *Nino v. Galaza*, 183 F.3d 1003, 1006 (9<sup>th</sup> Cir.1999)) Thus, the  
 10 statute of limitations began running on April 11, 2006, and ran until February 12, 2007, when  
 11 petitioner filed his state court habeas corpus petition. During that time period, 307 days elapsed.  
 12 Another 80 days elapsed from January 25, 2008, when the Nevada Supreme Court issued its  
 13 remittitur on the order dismissing petitioner's appeal of the denial of his habeas petition, until  
 14 petitioner filed the present action in this court on April 14, 2008.<sup>2</sup> Thus a total of 387 days expired  
 15 before petitioner filed his petition in this court, exceeding the one-year statute of limitations.

16 The limitations period is subject to equitable tolling if "extraordinary circumstances  
 17 beyond a prisoner's control" have made it impossible for the petition to be filed on time. *Calderon*  
 18 *v. U.S. Dist. Ct. (Kelly)*, 163 F.3d 530, 541 (9<sup>th</sup> Cir. 1998), *citing Alvarez-Machain v. United States*,  
 19 107 F.3d 696, 701 (9<sup>th</sup> Cir. 1996), *cert denied*, 522 U.S. 814, 118 S.Ct. 60, 139 (1997); *Calderon v.*  
 20 *United States Dist. Court (Beeler)*, 128 F.3d 1283,1288 (9<sup>th</sup> Cir.), *overruled in part on other grounds*

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21  
 22 <sup>1</sup>See Sup.Ct. R. 13(1)

23 <sup>2</sup>As respondents note, petitioner did file an appeal with the Nevada Supreme Court resulting in  
 24 the docketing of Nevada Supreme Court Case No. 48912. Index, Exhibit 1. The appeal was dismissed  
 25 on April 26, 2007, on the ground that petitioner had failed to designate an appealable order. Index,  
 26 Exhibit 8. Thus, Nevada Supreme Court Case No. 48912 is not a "properly filed" appeal under the  
 AEDPA and had no tolling effect on the statute of limitations.

1 by, *Calderon v. United States Dist. Court (Kelly)*, 163 F.3d 530 (9<sup>th</sup> Cir. 1998) (*en banc*) (noting that  
2 "[e]quitable tolling will not be available in most cases, as extensions of time will only be granted if  
3 'extraordinary circumstances' beyond a prisoner's control make it impossible to file a petition on  
4 time"). "When external forces, rather than a petitioner's lack of diligence, account for the failure to  
5 file a timely claim, equitable tolling of the statute of limitations may be appropriate." *Miles v.*  
6 *Prunty*, 187 F.3d 1104, 1107 (9<sup>th</sup> Cir.1999), *citing Kelly*, 163 F.3d at 541; *Beeler*, 128 F.3d at  
7 1288-1289.

8 In opposing respondents' motion to dismiss, petitioner does not argue that he is entitled to  
9 equitable tolling, but rather argues that respondents have miscalculated this running of the statute of  
10 limitations. Petitioner is mistaken. As stated above, respondents' calculations of the statutory  
11 tolling period include the ninety days following direct appeal in which an appellant can file a petition  
12 for a writ of certiorari in the United States Supreme Court. This ninety-day period, however, is  
13 applicable to the decision on direct appeal only, and not to the decision on a petition for writ of  
14 habeas corpus. The court must therefore conclude that the present petition for writ of habeas corpus  
15 is barred by the statute of limitations.

16 In order to proceed with an appeal, petitioner must receive a certificate of appealability.  
17 28 U.S.C. § 2253(c)(1); Fed. R. App. P. 22; 9<sup>th</sup> Cir. R. 22-1; *Allen v. Ornoski*, 435 F.3d 946, 950-  
18 951 (9<sup>th</sup> Cir. 2006); *see also United States v. Mikels*, 236 F.3d 550, 551-52 (9<sup>th</sup> Cir. 2001).  
19 Generally, a petitioner must make "a substantial showing of the denial of a constitutional right" to  
20 warrant a certificate of appealability. *Id.*; 28 U.S.C. § 2253(c)(2); *Slack v. McDaniel*, 529 U.S. 473,  
21 483-84 (2000). "The petitioner must demonstrate that reasonable jurists would find the district  
22 court's assessment of the constitutional claims debatable or wrong." *Id.* (*quoting Slack*, 529 U.S. at  
23 484). In order to meet this threshold inquiry, the petitioner has the burden of demonstrating that the  
24 issues are debatable among jurists of reason; that a court could resolve the issues differently; or that  
25 the questions are adequate to deserve encouragement to proceed further. *Id.*

26 Pursuant to the December 1, 2009 amendment to Rule 11 of the Rules Governing Section

1 2254 and 2255 Cases, district courts are required to rule on the certificate of appealability in the  
2 order disposing of a proceeding adversely to the petitioner or movant, rather than waiting for a notice  
3 of appeal and request for certificate of appealability to be filed. Rule 11(a). This court has  
4 considered the issues raised by petitioner, with respect to whether they satisfy the standard for  
5 issuance of a certificate of appealability, and determines that none meet that standard. The court will  
6 therefore deny petitioner a certificate of appealability.

7  
8 **IT IS THEREFORE ORDERED** that respondents' motion to dismiss is **GRANTED**.  
9 (Docket #20.) This petition is dismissed as barred by the statute of limitations.

10 **IT IS FURTHER ORDERED THAT** all pending motions are denied as moot.

11 **IT IS FURTHER ORDERED THAT** a certificate of appealability is **DENIED**.

12 **IT IS FURTHER ORDERED THAT** the clerk is directed to enter judgment for  
13 respondents and to close this case.

14 DATED: August 9, 2010

15 

16 UNITED STATES DISTRICT JUDGE